

Internal Revenue Service

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Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:TEGE:EB:QP2
PLR-129406-08

Date:
December 04, 2008

Legend

E =

EIN =

Plan =

Dear :

This responds to your authorized representative's letter of , and subsequent correspondence, on behalf of entity E, requesting a ruling concerning the deferred compensation plan (the "Plan") which E intends to be an eligible deferred compensation plan under section 457(b) of the Internal Revenue Code of 1986 (the "Code").

E represents that it is a tax-exempt organization under section 501(c)(3) of the Code and an eligible employer under section 457(e)(1)(B). The Plan was established by E for the benefit of a select group of management and highly compensated employees.

Under the Plan, an eligible employee becomes a participant by entering into an agreement to defer compensation into the Plan. The election must be made prior to the beginning of the month in which the employee's compensation is paid or made available.

The Plan provides for a maximum amount that may be deferred by a participant in any taxable year. It also provides for a catch-up contribution for amounts deferred for one or more of the participant's last three taxable years ending before he or she attains

normal retirement age under the Plan. The normal retirement age for purposes of the catch-up provisions is age 65. The amounts that may be deferred under the catch-up provisions are within the limitations of section 457(c).

Distribution events under the Plan include termination of employment, retirement date (termination of employment on or after normal retirement age), death, and disability. Upon the occurrence of a distribution event, a participant may elect to receive his distribution as a lump sum payment or in the form of installment payments. The participant may elect, during the 90-day period preceding a distribution event, to defer distribution of his account to a date no later than the required payment date. However, following the participant's retirement date, the participant may make an irrevocable election to defer distribution of the account, provided that election is filed before distribution is made and the deferred distribution date is not later than the required payment date.

The Plan also provides for a distribution due to an unforeseeable emergency that is a severe financial hardship resulting from extraordinary and unforeseeable circumstances beyond the control of the participant under section 457(d)(2).

The Plan provides for acceptance of transfers of a participant's account balance from another eligible deferred compensation plan maintained by a tax-exempt employer as provided for in section 457(e)(10). The Plan provides for permissive plan to plan transfers of all or a portion of a participant's account to another eligible deferred compensation plan maintained by a tax-exempt organization if the participant has terminated service and is an employee of the other eligible plan.

The Plan provides that all amounts deferred under the Plan, all property and rights purchased with such amounts, and all income attributable to such amounts, property or rights, shall remain (until made available to the participant or his beneficiary) solely the property and rights of the E, subject only to the claims of the E's general creditors. The Plan also provides that a participant or beneficiary has no right or claim against the assets of E. The rights of any participant or beneficiary to payments pursuant to the Plan are generally non-assignable and not subject to attachment, execution, garnishment, sequestration or other legal or equitable practice.

E has adopted a related trust to help it meet its obligations under the Plan.

Section 457 of the Code provides rules for the deferral of compensation by an individual participating in an eligible deferred compensation plan as defined in section 457(b).

Section 457(a)(1)(B) of the Code provides that, in the case of a participant in an eligible deferred compensation plan maintained by an organization (other than a

governmental unit) exempt from tax, any amount of compensation deferred under the plan and any income attributable to the amounts so deferred shall be includible in gross income only for the taxable year in which such compensation or other income is paid or otherwise made available to the participant or beneficiary. Section 457(b) provides that the term "eligible deferred compensation plan" means a plan established and maintained by an eligible employer in which only individuals who perform service for the employer may be participants and which meet the deferral limitations described in section 457(c); which meets the distribution requirements described in section 457(d); which provides for deferral elections described in section 457(b)(4); and, in the case of a tax-exempt plan, which requires the plan assets and income to remain (until made available to the participant or other beneficiary) solely the property and rights of the employer, subject only to the claims of the employer's general creditors.

Section 457(e)(1) provides that the term "eligible employer" means a State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State, and any other organization (other than a governmental unit) exempt from income tax.

Section 457(b)(4) of the Code provides that compensation will be deferred for any calendar month only if an agreement providing for such deferral has been entered into before the beginning of such month. An eligible plan may provide that if a participant enters into an agreement providing for deferral by salary reduction under the plan, the agreement will remain in effect until the participant revokes or alters the terms of the agreement.

Section 457(b)(6) requires an eligible plan of a tax-exempt employer to provide that i) all amounts of compensation deferred under the plan, ii) all property and rights purchased with such amounts, and iii) all income attributable to such amounts, property, or rights must remain (until made available to the participant or other beneficiary) solely the property and rights of the employer (without being restricted to the provision of benefits under the plan), subject only to the claims of the employer's general creditors.

Section 1.457-4(c)(3)(v)(A) of the regulations provides that a plan may define the normal retirement age for purposes of the last-three-years catch-up provision as any age that is on or after the earlier of age 65 or the age at which participants have the right to retire and receive, under the basic defined benefit pension plan of the State or tax-exempt entity (or a money purchase pension plan in which the participant also participates if the participant is not eligible to participate in a defined benefit plan), immediate retirement benefits without actuarial or similar reduction because of retirement before some later specified age, and that is not later than age seventy and a half. Alternatively, a plan may provide that a participant is allowed to designate a normal retirement age within these ages. For purposes of the three-year catch-up provision an entity sponsoring more than one eligible plan may not permit a participant

to have more than one normal retirement age under the eligible plans it sponsors. Section 1.457-4(c)(3)(v)(B) of the regulations provides a special exception for qualified police and firefighters to retire as early as age forty for purposes of the three-year catch-up provision.

Section 1.457-5 of the regulations provides that the section 457(c) eligible-deferral amount limitation is applied to all eligible plans in which a participant participates in a tax year and is determined on an aggregate basis. If a participant has annual deferrals under more than one eligible plan and the applicable catch-up amount is not the same for each such eligible plan for the taxable year, section 457(c) is applied using the catch-up amount under whichever plan has the largest catch-up amount applicable to the participant. To the extent that the combined annual deferral amount exceeds the maximum deferral limitation, the amount is treated as an excess deferral under §1.457-4(e) of the regulations. For purposes of determining whether there is an excess deferral resulting from a failure of a plan to apply the deferral limitations, all plans under which an individual participates by virtue of his or her relationship with a single employer are treated as a single plan (without regard to any differences in funding).

Section 457(d)(1)(A) of the Code provides that amounts distributed under an eligible plan will not be made available to participants or beneficiaries earlier than (i) the calendar year in which the participant attains age 70 1/2, (ii) when the participant has a severance from employment with the employer, or (iii) when the participant is faced with an unforeseeable emergency.

Section 1.457-6(c)(2) of the regulations provides the requirements for a unforeseeable emergency distribution. An unforeseeable emergency must be defined in the plan as a severe financial hardship of the participant or beneficiary resulting from an illness or accident of the participant or beneficiary, the participant's or beneficiary's spouse, or the participant's or beneficiary's dependent; loss of the participant's or beneficiary's property due to casualty (including the need to rebuild a home following damage to a home not otherwise covered by homeowner's insurance, e.g., as a result of a natural disaster); or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant or the beneficiary. Whether a participant or beneficiary is faced with an unforeseeable emergency is determined based on the relevant facts and circumstances of each case. However, a distribution on account of unforeseeable emergency may not be made to the extent that such emergency is or may be relieved through reimbursement or compensation from insurance or otherwise, by liquidation of the participant's assets, to the extent the liquidation of such assets would not itself cause severe financial hardship, or by cessation of deferrals under the plan. Further, distributions because of an unforeseeable emergency must be limited to the amount reasonably necessary to satisfy the emergency need (which may include any amounts necessary to pay any

federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution).

Section 457(d)(2) of the Code requires a plan to meet the minimum distribution requirements of section 401(a)(9). These requirements are described in §1.401(a)(9)-1 through 1.401(a)(9)-9 of the regulations.

Section 457(e)(10) of the Code provides that a participant shall not be required to include in gross income any portion of the entire amount payable to such participant solely by reason of the transfer of such portion from one eligible deferred compensation plan to another eligible deferred compensation plan. Section 1.457-10(b)(1) of the regulations provides that an eligible plan of a tax-exempt entity may transfer amounts to, and receive amounts from, an eligible plan of a tax-exempt entity if certain conditions are met: (i) the transferor plan provides for; (ii) the receiving plan provides for the receipt of transfers; (iii) the participant or beneficiary whose amounts deferred are being transferred will have an amount deferred immediately after the transfer at least equal to the amount deferred with respect to that participant or beneficiary immediately before the transfer; and (iv) in the case of a transfer for a participant, the participant has had a severance from employment with the transferring employer and is performing services for the entity maintaining the receiving plan.

Consistent with section 414(p)(10) of the Code, §1.457-10(c) of the regulations provides for distributions made pursuant to a qualified domestic relations order. If a distribution or payment is made from an eligible plan to an alternate payee pursuant to a qualified domestic relations order, rules similar to the rules of section 402(e)(1)(A) apply to the distribution. Section 414(p)(8) provides that the term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

Based upon the information submitted and the representations made by E and provided amendments are made to the Plan as submitted by E, we conclude as follows:

1. The Plan is an eligible deferred compensation plan as defined in section 457(b) of the Code and the regulations.
2. Amounts of compensation deferred in accordance with the Plan, including any income attributable to the deferred compensation, will be includible under section 457(a)(1)(B) of the Code in the recipient's gross income for the taxable year or years in which amounts are paid or otherwise made available to a participant or beneficiary in accordance with the terms of the Plan.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter. If the Plan is significantly modified, this ruling will not necessarily remain applicable.

No opinion is expressed concerning the timing of the inclusion in income of amounts deferred under any deferred compensation plan other than the plan described above. In addition, this ruling applies only to deferrals made after the date of this ruling.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Cheryl Press
Senior Counsel, Qualified Plans, Branch 2
(Employee Benefits)
(Tax Exempt & Government Entities)

Enclosure:

Copy for section 6110 purposes